NO. 2461.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

FRANK D. COOPER,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

GEORGE HEATON,
Defendant not joining in appeal.

APPELLEE'S BRIEF.

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This case, as briefly stated in appellant's brief, in his statement of the case, is one that was brought for the cancellation of the patent to certain lands comprising the homestead entry of Charles Gilbert. The allegations of fraud and other matters set forth in the pleadings can only be fully understood by a reading thereof, so no attempt will be here made to elaborate on the statement of the case as appellant has stated it and we content ourselves with replying to the argument of counsel for appellant as set forth in his brief.

ARGUMENT.

We will take up the argument of appellant in the order he has followed and reply to the first two subjects argued by him under this heading.

Appellant makes the assertion that the evidence in this case is wholly insufficient on which to base the findings made by the lower court, and then follows such assertion with what he pretends is a statement of all the evidence taken in the matter. Of course, if the evidence shows only what he contends it does there might be some reason for his conclusions, as to its insufficiency, being regarded as proper, but we most respectfully submit that the evidence in this case is amply sufficient to sustain the findings of the court and the decree, as the barest inspection of it will show.

It is admitted that Charles Gibert filed upon the land in question as a homestead entry, made final proof thereon and received a patent therefor (Tr. pp. 20-26); it is likewise admitted that the appellant purchased said lands from Gilbert but denied that he knew anything of the facts as to whether or not Gilbert had practiced any fraud upon appellee in making his entry or final proof. This latter must be ascertained from the evidence and the following summary will show, beyond a doubt, that the allegations of the complaint are fully proven:

The witness Edgar S. Foley, a special agent of the General Land Office, testified: that on Sep-

tember 25, 1906, he first saw the land in question and examined it; that he found no buildings upon it nor any plowing or fencing and no evidence of a house foundation; he saw Charles Gilbert, the entryman, and Gilbert told him he had lived on it and where the house had been and that Cooper had moved the house to another claim; the witness further testified that he had had experience examining all classes of entries; that he found a small pile of rocks there that looked as though they had been used for a camp fire; there was absolutely no evidence that these rocks had been used as a foundation for a house; that the first time he had gone to the Gilbert entry he stayed about twenty minutes and had been there several times later; he didn't find any buildings of any kind or any land under cultivation on the claim; Mr. Gilbert told him where a house had been; he didn't find any indications of any buildings on the entry that was in 1906, (Tr. pp. 44-47).

The witness, William L. Kinsey, testified: that he was a farmer and had lived in township 19 N., R. 3 West since April 1904; that he had known Cooper for twenty four years; that the Gilbert entry was in the same township he lived in and he never saw any improvements there; there was no cabin on the claim since the spring of 1904, the time he first knew it; at the place where Gilbert pointed out to Foley as the site of the house, there were a few rocks and a ditch made around ten or twenty feet square—just a small ditch, it could have been

a house or tent ditch; he never saw a cabin at that particular place at any time; he never saw a chicken house, fencing or any improvements; he saw Cooper there at least once before that time; that Gilbert worked for Cooper in 1904; witness thought Gilbert was herding sheep or tending camp for Cooper, (Tr. pp. 47-48).

On cross-examination the witness testified: that the first time he went into the locality of the Gilbert claim was in February, March or April, 1904; he was first on the Gilbert claim looking for some stock; there was no house on the upper side nor any improvements on the place; he knew the corner stone of the section; the witness saw Gilbert herding sheep for Cooper in 1904; Gilbert was camped right around Mr. Cooper's, and witness saw Gilbert at the shearing shed; Gilbert was camped at the Cooper Crown Butte ranch about a mile or so from the Gilbert entry, (Tr. pp. 48-49).

The testimony of the witness, Edwin R. Jones, is entirely omitted from appellant's comment on the evidence, it is as follows: Witness testified that he had known the Gilbert land since August 1904; that he could never see anything on it in the way of improvements; I went with Special Agent Foley to look at the place Gilbert pointed out as the place where the cabin had stood and we found nothing there except a few marks that would indicate something might have stood there at one time; it looked as if it was a trench for either a tent or a small cabin; there was nothing in the way of refuse in

the trench, possibly a dozen rocks were in it; I didn't see any indication of a chicken house or a corral having been there; there was no fence extending around the Gilbert claim in 1904, (Tr. pp. 49-51).

Frank J. Kinsey, testified: that he was a son of William L. Kinsey and had lived around that locality about 24 years; witness had a claim in section 21; first knew Gilbert entry in 1902; there was nothing on it when he first saw it in the way of improvements—no plowing or fencing; in 1904 the same conditions existed; in the spring of 1904 Gilbert was herding sheep at Cooper's Crown Butte ranch about one and a half miles from Gilbert's entry; that it is not customary for a man to leave his sheep and go to some other place and live and sleep; that from the time witness went out there in April, 1904, Cooper was up in that part of the country a good many times; witness saw him crossing the Gilbert claim; Cooper had a road across the Gilbert claim, which he or his men had made, and Cooper used the road in lambing; the road was worked, went around a side hill and across a creek, (Tr. pp. 51-52).

John Gardipee, Sr., testified: that he had known Cooper for ten years and knew where the Gilbert claim was located; that he had been through the claim ever since 1902; the witness couldn't describe any improvements on the claim because there never was any there that he knew of—he never saw any fence; a wagon road crosses the claim; he

didn't see any fence around the claim; (Tr. p. 55).

John B. Gardipee, testified: that in the spring of 1903 he worked out there (near Gilbert's entry) off and on; he knew Gilbert about ten years ago (1900) Gilbert was working for Cooper in 1902 and 1903 or 1904; he saw Cooper driving around that section of the country in 1902, 1903 and 1904; he did not see any improvements on the Gilbert claim in 1904; he never saw a chicken house, fence or corral on the claim, (Tr. pp. 55-56).

Appellee, thereupon, introduced in evidence the testimony of Charles Wise and William Mahaffey, given upon the final proof hearing of Gilbert's homestead entry; these two witnesses upon said final proof both testified as follows: I am well acquainted with claimant (Gilbert) and the land embraced in his claim; it is grazing land; in March, 1899, claimant settled, built house and established residence upon the homestead; claimant has resided continuously on the homestead since first establishing residence; he is unmarried; claimant has not been absent from the land since making settlement; claimant has one and a half acres in garden, balance in pasture; the improvements on the land are a house 16 x 20, chicken house, corral, 1½ acres broke, all fenced, worth $300.00; claimant has acted in good faith, (Tr. pp. 58-61).

Thereupon the testimony given by Charles Gilbert in making final proof was introduced by plaintiff; this showed that Charles Gilbert had testified as follows: My name is Charles Gilbert, I

am 62 years old, reside at Cascade, Montana; I am the identical person who made homestead entry for the N ½ NW ¼ Sec. 14 and E ½ NE ¼ Sec. 15, Tp. 19 N., R. 3 W. in the Helena Land Office December 1, 1898; my house was build on the land in March, 1899, and I then established residence thereon; the house is 14 x 20 feet; other improvements are a chicken house, stable, all fenced, 1½ acres broke, worth $300.00; I am unmarried and have lived on the land since entry or since March, 1899; I have not been absent from the homestead since making settlement; I have cultivated one and a half acres each season for garden, balance in pasture, too rough to break; the land is grazing only; I have no personal property elsewhere than on this claim, (Tr. pp. 62-64).

Appellee then introduced in evidence the final affidavit of Charles Gilbert made in connection with his final proof, among other formal things it said: "I have made actual settlement upon and cultivated and resided upon said land since the 1st day of March, 1899 to the present time," (Tr. p. 64).

In addition to the foregoing the Appellant, himself, testified that he moved into the township where Gilbert's claim was in 1876 and two or three years later himself took up a homestead; that Gilbert had worked for him but he didn't remember when; during the years 1902 and 1903 Gilbert had lambed a bunch of sheep up there (at the claim) for him.

The rest of Cooper's testimony was nearly all what he did not remember; he kept no books to show when Gilbert worked for him, except a time book, which was never produced to contradict the testimony of the witnesses who have, as shown above, testified positively that Gilbert was working for him prior to making final proof on the claim.

Can it possibly be said that a man can live in a neighborhood from 1876 to 1910, and all but three years of said time have a homestead in the same township with the claim under consideration, own about 21,000 acres of land all around the claim, and yet know nothing about the homestead entry of a man who has resided on the entry for over five years continuously and had the claim fenced. Would it be possible for a road to be constructed across this claim by Cooper or Cooper's men and used by them and this claim exist, completely fenced as it was claimed in the final proof to be, all within the domain or empire of this sheepman and he never know anything about it?

The testimony of the witnesses Short and Belgarde (Tr. pp. 53-55; 56-57) was certainly admissible to show the usual methods employed by appellant in obtaining title to land from the United States. Short testified that he was to receive something like $100. for using his filing right for Mr. Cooper, (Tr. p. 54); Short never saw the land, the description and papers were furnished by Cooper and Cooper paid the filing fee, (Tr. p. 54). Belgarde also filed on a piece of land at Cooper's sug-

gestion, and thinks Cooper must have paid for making out the papers and the filing fees, he, Belgarde, never did, (Tr. pp. 56-57).

In cases of this kind it is seldom, if ever, possible to secure direct proof of the fraudulent acts of a party, for from the very nature of things persons who are engaged in the business of acquiring land from the United States and building up a vast domain such as Cooper had, do not work openly. On the contrary such persons are careful that no written evidence of their scheme to obtain the land is available and no one except the entryman, who is duped into taking part in the plan for a few paltry dollars, is present. Indeed, it is remarkable that men, of apparently good standing in a community, will go into the business of acquiring lands as Cooper did in the present instance, and, when the United States objects to its land laws being abused, protest they have always been acting in good faith and are purchasers for a valuable consideration, when in truth and in fact they have watched their tools, men like Gilbert file upon claims and have seen the land laws more honored in their breach than observance. The most unobserving person, in Cooper's position, would have been compelled to notice that Gilbert's entry was a sham and a fraud and unless, like Cooper, were desirous of acquiring it would have denounced it for what it was—a palpable attempt to defraud the government.

In the case of U. S. v. Stimson, 197 U. S. 200-207, cited by appellant on page 14 of his brief, the

decision of the court was based upon the fact that forty years had elapsed since the commission of the alleged fraud and the institution of the suit and the purchaser from the patentees had held the lands and obtained large credits on the strength of being such owner, and the creditors were equitably entitled to protection. This together with the weakness of the evidence was the reason for said decision, but the poor quality of the evidence was not alone the basis of the decision.

In the case at bar we have no such considerations as there were in the Stinson case, *supra;* here Cooper had retained the lands but only a few years had elapsed and no rights of creditors are involved.

Appellant seems to argue that because he purchased this land from Gilbert without any knowledge that the United States claimed Gilbert had not complied with the law, that he is an innocent purchaser for value. But a man cannot sit idly by and live in the neighborhood of a piece of land from 1876 until 1904, the time when final proof was made and the land bought by him, and say that he was innocent of what Gilbert had done. A man cannot close his eyes, as Cooper desires this court to believe he did, and then profit by his endeavors to notice nothing. He must have known on July 15, 1904, when he purchased the land, that Gilbert had worked for him herding sheep for several years prior thereto, and knowing that Gilbert was so in his employ, he, an experienced sheepman, knew that Gilbert did not herd sheep at some remote portion

of Cooper's 21,000 acres and return to the claim every night, or even maintain a "continuous residence" for five years as the law required a homesteader to do. It was not incumbent upon the United States to notify Cooper, or anyone else, that it would insist on a cancellation of the patent within the statutory period, if it discovered that Gilbert had practiced a fraud in making his final proof. Indeed, Cooper was so anxious to secure this land that he could not wait until a patent had issued for it, but purchased it July 15, 1904, less than thirty days after final proof was made and five and a half months before patent issued. It is absurd to say that a man who owns a large tract of land, "a man of large affairs," is by reason of that fact not expected to know what is being done with a piece of land, over which he built a road and in whose service the entryman had been engaged for several years prior to the final proof and purchase.

We must respectfully submit that the evidence in this case shows most conclusively: that Gilbert never complied with the law so as to entitle him to a patent; that both Gilbert and his witnesses on the final proof hearing are shown to have been most reckless with the use of the truth; that the statements contained in the testimony given on the final proof hearing were absolutely false and were made for the sole purpose of deceiving the officials of the United States Land Office; that Cooper was aware of all that transpired in and about the homestead of Gilbert and particularly as to the improvements

never existing as the final proof said they did and that no residence was ever established or maintained as was claimed. Cooper does not deny that the testimony given at the final proof hearing was false but contents himself with asserting that he knew nothing about it. He bases his good faith upon what was contained in the final proof and its acceptance by the officials of the land office, but his knowledge of the country and the doings therein acquired by nearly thirty years residence and the fact that Gilbert had been in his employ for several years immediately prior to the making of the final proof must have advised him that a fraud was being perpetrated and he cannot claim he was without fault. The mere fact that the title he bought was nothing but one based on a final receipt issued less than thirty days before the purchase was a thing that should have put him upon inquiry and if he neglected to inquire into the bona fides of the entry his neglect is no protection to him. His "large affairs" and enormous land holdings alone show that he was a man well versed in the ways of the world and particularly with all the details of acquiring the public domain. Cooper's pretended ignorance of what Gilbert had done on the claim and lack of knowledge as to what residence a man had in such close proximity for a period of over five years is a circumstance in itself that brands Cooper with a guilty knowledge of the fraud.

THE DECREE.

It is contended by the appellant, that this action having been brought for the purpose of having cancelled a patent issued to the entryman of the land in question, the court could not make or enter any decree except a decree cancelling the patent or a decree dismissing the bill of complaint, and that more than six years having elapsed between the date the patent was issued and the date when the defendant Heaton was made a party to the action, the defendant Heaton in his answer having pleaded an interest in the lands and the statute of limitations, the court could not enter a decree cancelling the patent and could only enter a decree dismissing the bill of complaint.

In order to arrive at a proper understanding of the contention of the appellant it is necessary to review briefly the pleadings in this action and a portion of the evidence taken by the Examiner in Chancery.

In the original bill of complaint the appellant Cooper was named as the sole defendant. After alleging certain acts which constituted fraud on the part of the entryman, the bill of complaint alleged that the appellant Cooper knew, at the time he purchased the lands, of the fraud perpetrated by the entryman and purchased the land with full knowledge thereof. The bill of complaint was filed on December 7th, 1909. The appellant appeared and filed his answer to the bill of complaint on

March 29, 1910. In his answer the appellant, after certain making certain admissions and denials, alleges that before the commencement of the suit he had entered into a contract with one George Heaton, whereby he had agreed to sell said land to said George Heaton for a valuable consideration, and that the said Heaton, without any knowledge of any fraud on the part of the entryman, had purchased said land from the appellant Cooper, (Tr. p. 25). Upon the filing of the appellant's answer in which the purchase of the land by Heaton was alleged, the appellee obtained an order directing that George Heaton be made a party defendant, and permitting the appellee to amend its bill of complaint so as to state the case as to him, (Tr. p. 27). After obtaining this order the appellee amended its complaint by making certain interlineations in the original bill of complaint, by adding thereto an additional paragraph numbered "Eleventh" and by adding to the prayer a provision asking for the cancellation of the contract for the sale of said land referred to in the appellant's answer, (Tr. pp. 28-30). All of these amendments are indicated in the transcript by underscoring, so that it may be readily seen from the transcript the diference between the original bill of complaint as filed and as the same stood after these amendments were made, (Tr. pp. 2-17). After the making of this order and the amending of the bill of complaint, the defendant Heaton filed his answer on December 2nd, 1912, (Tr. pp. 33-39), in which, after making certain ad-

missions and denials, he alleged that on December 13th, 1909, the appellant and defendant entered into a contract for the sale of said land, together with other lands, by appellant to defendant, at $5.70 an acre, and that on the 22nd day of April, 1911, the defendant Heaton had assigned, sold and transferred all of his interest in said contract to the Great Falls Farm Land Company, (Tr. pp. 37-39). To each of the answers of the appellant and defendant the appellee filed its replication, (Tr. pp. 26 and 40).

It will be seen from this review of the pleadings, that the action was originally commenced against the appellant Cooper for the purpose of cancelling a patent to certain lands, that after the appellant filed his answer alleging that he had parted with his title to said lands under a contract for the sale thereof to the defendant Heaton, the bill of complaint was amended so as to make Heaton a party defendant and so as to state a case as to him, and that thereupon the defendant Heaton filed his answer alleging that he had acquired an interest in said lands by virtue of having entered into a contract for the purchase thereof with the appellant Cooper, but that this defendant had thereafter parted with his interest in said lands by assigning and transfering said contract to the Great Falls Farm Land Company.

After the appellee had introduced its evidence in support of the allegations contained in its bill of complaint as amended, the appellant and defend-

ant introduced evidence in rebuttal thereof and also in support of the allegations in said answers that the appellant Cooper had entered into said contract to sell said land, together with other lands, to the defendant Heaton.

The appellant Cooper, testifying in his own behalf and that of the defendant Heaton, stated that he had sold said lands which he had purchased from the entryman, (Tr. p. 66). There was thereupon introduced in evidence a contract between the appellant Cooper and the defendant Heaton for the sale of said lands, together with other lands, by appellant to the defendant, (Tr. pp. 66 to 74). This was all of the evidence introduced to prove these allegations as to the contract and sale by the appellant to defendant.

From an examination of this contract, introduced in evidence, we find that on December 13th, 1909, four days after the filing of the bill of complaint against the appellant, the appellant and defendant Heaton entered into said contract; that this contract provides for the sale of 21,840 acres of land, including the land involved in the action, at the rate of $5.70 an acre, payments to be extended over a period of years, the last payment becoming due October 1, 1914, and no deeds to be delivered until final payment made.

It will be observed that while the defendant Heaton in his answer alleged that he had parted with all of his interest in said contract by assigning and transferring the same to the Great Falls Farm

Land Company, no evidence whatever was introduced to show an assignment, so that as the evidence now stands we find that a contract was entered into between the appellant and defendant Heaton, and that Heaton still holds and retains said contract.

The court, in its decree, found that all of the allegations of the bill of complaint as to the fraud of the entryman were fully sustained by the proof; that the allegations of said bill of complaint that the appellant had full knowledge of such fraud at the time he purchased said land was fully sustained by the proof; that a contract for the sale of said land was entered into between the appellant Cooper and the defendant Heaton; that more than six years had elapsed between the date of issuance of patent and the date of the order directing the making of Heaton a party defendant to said action and that it was therefore impracticable to cancel said patent; that the value of said lands was $5.70 an acre; (Tr. pp. 41-44).

All of these findings of the court are fully sustained by the proof. We have heretofore considered the evidence introduced to prove the fraud on the part of the entryman and the knowledge thereof by the appellant Cooper so that it is not necessary to examine this evidence here. The contract introduced in evidence supports the finding of the court as to the existence of the contract, while the date of the issuance of patent, as alleged in the bill of complaint, and the date of the order directing that Heaton be made a party defendant show

that more than six years elapsed between these dates and sustain this finding. Appellant contends, however, that there is no evidence as to the value of the land. We take it, that it is a principle of law that cannot be contradicted that all of the evidence must be taken and considered together, and that evidence introduced on the part of a defendant which tends to prove the plaintiff's case will be considered in connection with the plaintiff's case in exactly the same manner as though such evidence was introduced by the plaintiff. This being true we have in evidence the contract between the appellant and the defendant Heaton in which it is stated that this land, together with other lands, is to be paid for at the rate of $5.70 an acre. Here then is direct proof introduced by the defendant showing the value of the lands, the value which the appellant was willing to accept and the defendant Heaton willing to pay. This evidence is sufficient to sustain the finding of the court as to the value of the lands.

But whatever the findings of the court may have been, the appellant strenuously contends that the action having been brought to cancel a patent the court could not enter a decree refusing to cancel the patent, but decreeing that the value of the land, with interest thereon, should be paid by appellant to the appellee, or if the appellee failed to pay the same that the defendant Heaton should pay the amount and withhold the same out of the purchase price under said contract remaining unpaid, and

that the appellee should have a lien on said land for such amount and foreclosure of such lien, and that such decree as entered is not sustained by the pleadings in the case.

In support of this contention the appellant cites a number of authorities. Upon an examination of these authorities we believe that the only authority cited which is at all in point is that of Crocket vs. Lee, 7 Wheat. 523, and appellant certainly must possess a most optimistic mind if he can obtain any satisfaction out of that particular decision. None of the other cases cited by appellant, when the subject matter of each particular case is considered, have any application to the case at bar.

At this time it is well to remind appellant that he alone is appealing from the decree entered in the lower court. The defendant Heaton seems to be well satisfied with the decree entered as he refused to join in this appeal and an order of severance was made (Tr. pp. 89-90), permitting the appellant to appeal.

We are free to confess that if evidence had been introduced by appellant and defendant showing that the defendant Heaton had transferred his interest in said contract to the Great Falls Farm Land Company, as he alleged in his answer, no decree could have been entered which would have been binding on either the defendant Heaton or on the Great Falls Land Company, but in the absence of such evidence does the appellant mean to contend that the court could not enter a decree which would be binding

on Heaton, particularly where, as in this case, he will suffer no injury whatever by reason thereof? The court found that fraud was committed by the entryman and that the appellant purchased the land with full knowledge of such fraud but that the defendant Heaton had no such knowledge. The decree is to the effect that the appellant Cooper, who became the owner of said land with knowledge of the fraud of the entryman, is the one who is to suffer. Heaton suffers no injury, he is simply directed to pay out of the amount he still owes the appellant Cooper the value of the lands with interest. It could make no difference to the defendant Heaton whether, in the absence of the decree, he should pay the balance of his purchase price to the appellant, or whether, the decree being entered, he pays the value of the land with interest to the appellee, retaining such amount out of the balance due the appellant under the contract. In either case he will pay the full purchase price for all of the lands covered by the contract, no more and no less. This being true the appellant then comes into this court on this appeal, with the findings of the court sustaining the allegations of the bill of complaint as to fraud on the part of the entryman and knowledge of such fraud by the appellant at the time he purchased the lands, and says, that because the action was an action to cancel the patent and the court found it impracticable so to do, he ought not to be required to make restitution, and that notwithstanding his participation in the fraud or the

fact that he has been benefitted thereby when he had knowledge thereof, he should be permitted to go hence without being compelled to suffer in any way for his own wrongful and unlawful acts. He comes into court with unclean hands and contends that even if he did have knowledge of the fraud of another whereby the appellee was injured and he was benefitted by that fraud he should be permitted to continue to enjoy such benefits and the appellee should have no recourse against him for such injury. The rules of equity which require that one who seeks equity must do equity and that one cannot come into a court of equity with unclean hands and ask for equity apply with all their force to this particular case. While the bill of complaint asks for the cancellation of the patent, yet, the decree as entered, while refusing to cancel the patent, requires nothing more than that equity and justice be done between the parties benefitted and injured by the fraud practiced by the entryman.

The prayer of the bill of complaint, as amended, asks for specific relief, the cancellation of the patent, the deed from the entryman to the appellant and the contract between appellant and defendant, and also asks for "such other and further relief in the premises as the circumstances of this cause may require, and as to this Honorable Court may seem meet and proper, and as shall be agreeable to equity and good conscience," (Tr. p. 16).

Under a prayer for general relief a court of equity will extend relief beyond the specific prayer

and not exactly in accordance with it and any relief that is agreeable to the case made by the pleadings can be granted under such a prayer, a court of equity having power to adapt its remedies to the circumstances of each particular case as developed by the pleadings and evidence, and in this case it was the duty of the court, after finding it was impracticable to cancel the patent, as prayed for in the specific prayer of the bill of complaint, by its decree to adopt and prescribe such remedies as would require justice to be done between the parties.

In the case of Walden vs. Bodley, 14 Peters 156, Justice McLean, in delivering the opinion of the court, said:

> "But the court have, by the bill, answer and evidence, the equities of the parties before them; and having jurisdiction of the main points, they may settle the whole matter. A court of equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out, in detail, the means which the court should adopt in giving relief. Under the general prayer for relief, the court will often extend relief beyond the specific prayer, and not exactly in accordance with it."

And in this case the court, having found it impracticable to cancel the patent, but having a case fairly made by the bill and answers, it was within its power to, by its decree, adopt such remedies as would do justice between the parties.

In Lockhart vs. Leeds, 195 U. S. 427, Justice Peckham, who delivered the opinion, said:

> "Again it is alleged that the bill prays that the location of what is called the Washington Lode by the defendants be declared void, and that the plaintiff may have the possession of the claim, while the plaintiff now asks to have the defendants treated as constructive trustees, etc., which is inconsistent, as alleged, with the former prayer for relief. The bill contains a prayer for general relief in addition to the prayer for special relief, and under such prayer this relief may be given. It is objected that under the prayer for general relief no relief of that nature can be granted, inasmuch as it is opposed to the special relief asked for by the bill, and also because the general allegations of the bill do not justify such relief. All of the facts upon which the plaintiff seeks relief from a court of equity are clearly stated in the bill. The facts constituting the fraud are set forth, and it is alleged that the parties doing the acts mentioned concealed them from the plaintiff for the purpose of defrauding plaintiff out of his interest and ownership in the mine. Having set out all the facts upon which the right to relief is based, the plaintiff asks specially for the possession and also for the proceeds of the mine, because by reason of the facts, the location made by the defendants was a void location. Whether it was a void location or not, was a matter of law arising from the facts appearing in the bill. Those facts were not changed in the slightest degree, nor were any

inconsistent facts set up thereafter. The plaintiff now under his prayer for general relief contends that, although the location of the Washington lode by the defendants may have been so far valid as to create a title in the defendants, yet that by reason of the fraud already distinctly set forth in the bill the plaintiff was entitled to avail himself of that title, and to hold them as trustees ex maleficio, for his benefit."

"There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief, under the general prayer, to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief and upon a somewhat different theory from that which is advanced under one of the special prayers. The cases of English vs. Foxhall, 2 Pet. 595; Boone vs. Chiles, 10 Pet. 177; Hobson vs. McArthur, 16 Pet. 182; Hayward vs. National Bank, 96 U. S. 611; Georgia vs. Stanton, 6 Wall. 50, are not opposed to the views just stated."

See also:

Watts vs. Waddle, 6 Pet. 389;

Ridings vs. Johnson, 128 U. S. 21;

Tayloe vs. Merchants, 9 How. 390;

Stevens vs. Gladding, 17 How. 447;

English vs. Foxhall, 2 Pet. 595;

Sage vs. Central Ry. Co., 99 U. S. 334;

Hepburn vs. Dunlop, 1 Wheat. 179;

Wiggins Ferry Co. vs. O. & M. Ry. Co., 142 U. S. 396.

In Tyler vs. Savage, 143 U. S. 79, the court, speaking through Justice Peckham, said:

> "The relief against Tyler was properly granted under the prayer of the bill for general relief. It was consanant with the facts set out in the bill as a ground of relief against Tyler personally and it was relief agreeable to the case made by the bill."

The rule, that when a party shows by a bill of complaint facts which entitle such party to equitable relief such relief, as may be agreeable to the case made and the evidence in support thereof, may be granted under the prayer for general relief, is followed in the Federal courts and in most, if not all of the state courts.

> "The special relief prayed in this bill is to quiet title or remove a cloud, but there is also a prayer for general relief. Upon the state of facts set forth by the bill I am of the opinion that plaintiff cannot have the special relief he prays, but rather would be entitled to a decree declaring him to be entitled to the legal estate and that the defendants hold the same in trust for his use and benefit, and for a conveyance

of the same to him, etc. But misapprehension by the plaintiff as to the special relief he is entitled to is no ground for demurrer where there is a prayer for general relief, for in such a case, if the bill sets out facts showing a right to relief the court will grant the proper relief under the general prayer."

Patrick vs. Isenhart, 20 Fed. 339;

Adams vs. Kehlor Mill. Co., 36 Fed. 212.

"Under our statutes and the practice which must prevail in courts whose law and equity powers are blended like ours, it would clearly appear that, in a case like the present, where plaintiffs have brought a civil action for the enforcement and protection of their rights, or the redress and prevention of their wrongs, it is the duty of the court to grant such relief as the complaint and the proof made thereunder, show them entitled to receive, without any distinction between law and equity. If they have a remedy at law let it be enforced; and if the remedy is an equitable one let it be applied in like manner."

Leopold vs. Silverman, 7 Mont. 266.

"If the prayer of a bill in equity is for general as well as special relief the court has power to mold the decree to meet the case made on the record."

Spevey vs. Frazer, 7 Ind. 661;

Pensacola & G. R. Ry. vs. Spratt, 12 Fla. 26.

"When the relief granted is not repugnant to the facts alleged and proved it is properly granted, altho not specifically prayed for, under the prayer for general relief."

Penn vs. Folger (Ill.) 55 N. E. 192.

"A court of equity, having jurisdiction of the parties and the subject matter, will make its jurisdiction for complete relief."

Ober vs. Gallagher, 93 U. S. 199.

"Equity, having obtained jurisdiction of the principal question, will proceed to give such complete relief as the justice and equity of the case may require."

Hopburn vs. Dunlop, 1 Wheat. 179.

"A general prayer for such relief as may be just and equitable warrants the court in granting to the plaintiff such relief as the facts upon the trial justify."

Finlayson vs. Peterson, (N. Dak.) 57 Am. St. Rep. 584.

See also:

Vol. 39 Cent. Dig. Plead. 143-144.

In this case the decree granted relief which was not inconsistent with the allegations of the bill of complaint. It is true that the decree did not order the patent cancelled, but it granted the appellee relief from the fraud practiced by the entryman by taking from the appellant, who knew of the

fraud, the benefits he derived therefrom, and giving such benefits to the appellee who was defrauded. That, to which the appellant was not entitled, was by the decree taken from him, and given to the appellee to reimburse it for the land out of which it had been defrauded. The relief granted by the decree was consistent with the case made by the pleadings, not the bill of complaint alone, but all of the pleadings in the case, and adjusted the equities between the parties. If the findings of the coure are correct and the appellant knew of the fraud practiced upon the appellee then in equity and good conscience he ought not to be permitted to reap the benefits of such fraud, and all that the decree does is to take from him these benefits and give them to the party who was defrauded. The decree was properly entered and should be sustained.

In the event, however, that this court should find that the allegations set forth in the bill of complaint are not sufficient to sustain the decree, we submit, that in view of the evidence taken in the case and which does fully sustain the decree, this court should remand this case to the lower court with directions to so amend said bill of complaint that the same will conform to the evidence and sustain the decree.

> "When the facts of the case show the plaintiff to have an equitable title to relief, this court, while it may be unable to afford such relief upon the case made by the bill, may re-

mand the case to the court below for an amendment of the pleadings and such further proceedings as may be just."

Wiggins Ferry Co. vs. O. & M. Ry. Co., 142 U. S. 396;

Crocket vs. Lee, 7 Peters 522;

Watts vs. Waddle, 6 Pet. 389;

Walden vs. Bodley, 14 Pet. 156;

Neale vs. Neale, 9 Wall. 1;

Harden vs. Boyd, 113 U. S. 756;

Adams vs. Kehler Mill Co., 36 Fed. 212;

Jones vs. Meehan, 175 U. S. 1;

Liverpool etc. vs. Phenix Ins. Co., 129 U. S. 39.

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